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The Role of Law in a Palestinian-Israeli Accommodation

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THE ROLE OF LAW IN A PALESTINIAN-ISRAELI ACCOMMODATION*

John Quigley**

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I. INTRODUCTION

A tension runs through the Palestinian-Israeli efforts at accommodation, and its resolution may be key to the success of the endeavor. The tension is between solutions that are based on the legitimate rights and interests of the parties on the one hand, and solutions that are deemed politically feasible on the other. Ideally, the two would coincide so that

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the parties could readily agree on terms that would be widely acknowledged as protecting the rights of all concerned.

The positions taken to date, however, particularly on the Israeli side, deviate significantly from what is called for by relevant international norms. As a result, the prospect looms of an agreement that will violate rights on the Palestinian side. Such an agreement would likely be challenged by Palestinians adversely affected, a challenge that could be expressed in an individual manner as persons seek redress for themselves, or collectively, in the form of concerted political action in opposition to the agreement. If such challenges occur, the agreement will be in jeopardy, and violence is likely to result.

This Article explores the issues to be addressed in the final status negotiations between the PLO and Israel. It examines the public position taken by each party on these issues and the legal norms relevant to them. It then examines the part played by the international community with respect to the Israeli-Palestinian dialogue and in particular the international community's attitude to the role of legal norms. Finally, the Article seeks ways of implementing an approach that would maximize the conformity of the solutions reached to applicable legal norms.

II. THE PLACE OF LEGAL NORMS IN TERRITORIAL SETTLEMENTS

Negotiations about a settlement between two contending parties in a territorial dispute are inevitably influenced by political factors. The relative bargaining strength of the two parties may be a significant determinant of the outcome, as the party in the stronger position seeks advantages even to the detriment of the legally protected interests of the party in the weaker position.

The relevance of legal norms in such settlements is seen in the handling of the myriad problems that have arisen in eastern Europe following the break-up of the Soviet Union. In the early 1990s, the treatment of minority ethnic Russians in new states on Russia's periphery threatened to lead to armed conflict. European institutions, and in particular the Organization for Security and Cooperation in Europe (OSCE), assumed a prominent role on this issue, and its approach was heavily based on ensuring the protection of the legal rights of the affected populations. Finding an obligation on all states to grant citizenship rights to long-term inhabitants, regardless of their ethnicity, the OSCE pressured states like Estonia and Latvia to conform to legal norms as the European institutions

found those norms to be, and thus to admit as nationals groups of ethnic Russians that those states would have preferred to exclude.¹

It has long been recognized that in such situations individuals as such and in their collectivity have legally protected interests that the parties must respect. Peace agreements routinely require states to respect the rights of inhabitants whose ethnic affiliation put them on the side of the erstwhile adversary.² If sovereignty in a territory changes, the new sovereign typically honors the rights of inhabitants, regardless of ethnic affiliation. Examples among many are the agreements by which the United States acquired Florida from Spain, and Alaska from Russia.³ In each instance, the United States respected land titles granted by the former sovereign,⁴ as well as the right of all inhabitants to remain in the territory.⁵

Extensive attention was given to the rights of inhabitants following World War I, when the state boundaries of much of Europe were reconfigured at the Versailles conference, leaving many ethnic groups a minority in a state dominated by some other ethnic group. The League of Nations developed an extensive system of protection, and treaties required these states to respect the rights of minorities in such matters as the use of their language, exercise of their religion, and access to public services and public employment.⁶

¹ See *Recommendations by the CSCE High Commissioner on National Minorities, Mr. Max van der Stoep, Upon His Visits to Estonia, Latvia and Lithuania*, 14 HUM. RTS. L.J. 216, 220 (1993) (offering recommendations about treatment of minorities in Latvia).

² See Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y. B. INT'L L. 284, 291 (1963).

³ See Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, 8 Stat. 252 (the treaty under which the United States acquired Florida from Spain); Treaty Concerning the Cession of the Russian Possessions in North America to the United States of America, Mar. 30, 1867, U.S.-Russ., 15 Stat. 539 [hereinafter Treaty Concerning Cession of the Russian Possessions].

⁴ See Treaty of Amity, Settlement, and Limits, *supra* note 3, art. 8, ("all the grants of land made before the 24th of January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, . . .", *enforced in* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833)); Treaty Concerning Cession of the Russian Possessions, *supra* note 3, art. 2 (recognizing Russian land titles).

⁵ See, e.g., Treaty of Amity, Settlement, and Limits, *supra* note 3, art. 6 (requiring the United States to extend citizenship to inhabitants of ceded territory); Treaty Concerning Cession of the Russian Possessions, *supra* note 3, art. 3 (giving citizenship rights to Russian nationals resident in Alaska unless they moved back to Russia).

⁶ See Treaty of Peace with Germany (The Versailles Treaty), June 28, 1919, 2 Bevans 43 (stating that residents of the Saar basin were to retain certain rights); Treaty

The danger of ignoring rights of individuals and peoples is apparent if one recalls instances of failure to respect those rights. One leading example is the failure, after World War I, to create a Kurdish state in the territory of the former Ottoman Empire. Despite tentative agreement to create such a state,⁷ the boundaries finally agreed upon between Turkey and the Allies split the Kurds' territory among other states.⁸ Eight decades later, the Kurdish issue continues as a highly contentious matter on the international agenda. Kurds find themselves in a position of inferiority in the states into which the Kurdish territory was divided, and sharp hostility, often manifested in violence, continues.⁹ In Turkey, even speaking in favor of Kurd separatism is a criminal offense, and the government regularly prosecutes persons who advocate Kurdish independence.¹⁰ A number of convictions have been criticized by the European Commission on Human Rights.

Such rights protection in peace agreements is viewed as critical to the stability of the peace. The OSCE, as its title implies, takes on as its primary task the maintenance of stability on the continent. Its work to secure the protection of ethnic minorities in the territory of the former Soviet Union was motivated primarily by security considerations. The same was true for the indicated activity of the League of Nations after World War I. It was feared that the newly configured borders of Europe would crumble if disaffected ethnic minorities began to appeal to the governments of states in which the particular minority was a majority. Thus, protecting the rights of those minorities was critical to the peace.

Between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes, Sept. 10, 1919, arts. 7, 9, 1 INTERNATIONAL LEGISLATION 312 (Manley O. Hudson ed., 1931); Treaty Between the Principal Allied and Associated Powers and Roumania, Dec. 9, 1919, 5 L.N.T.S. 335; *see also* Treaty Concerning the Protection of Minorities in Greece, Aug. 10, 1920, 28 L.N.T.S. 243 (recognizing the rights of all Greek citizens regardless of race or creed).

⁷ *See* Treaty of Peace Between the Allied Powers and Turkey, Aug. 10, 1920, art. 64, 15 AM. J. INT'L L. 179, 193 (Supp. 1921) (never ratified).

⁸ *See* Treaty of Peace, signed at Lausanne, July 24, 1923, art. 3, 28 L.N.T.S. 11, 17.

⁹ *See* Richard Falk, *Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars*, 5 MICH. J. INT'L L. 591, 591-93 (1994).

¹⁰ *See* Press Releases Issued by the Registrar of the European Court of Human Rights (Strasbourg, March 1998) (visited Feb. 1, 1999) <<http://www.dhcour.coe.fr/eng/PRESS/emarch98.html>> (summarizing Commission decisions in *Karatas v. Turkey*, *Arsland v. Turkey*, *E.P. v. Turkey*, *Ceylan v. Turkey*, *Okcuoglu v. Turkey*, *Gerger v. Turkey*, *Erdogu and Ince v. Turkey*, and *Surek v. Turkey*).

International responsibility for rights protection in peace agreements increased with the creation of the United Nations. Under the U.N. Charter, the Security Council was given responsibility for dealing with threats to the peace, and if a territorial settlement is one not likely to hold, international peace may be threatened.¹¹ Another post-war development that enhanced international responsibility was the adoption in 1949 of the Geneva Civilians Convention, which incorporated the notion of the collective responsibility of states parties for the rights of persons in territories under belligerent occupation.¹²

The emergence of human rights law at that same period also strengthened rights protection in such situations, because any state controlling territory must respect the rights of the inhabitants, even apart from a stipulation in a treaty of accession. The three developments -- creation of the United Nations, collective responsibility for belligerent occupation, and the emergence of human rights law -- further internationalized such matters, requiring states to conform to generally recognized standards in their treatment of individuals and population groups in territorial settlements.

III. UNITED NATIONS AND THE PALESTINIAN-ISRAELI NEGOTIATIONS

International efforts at promoting an accommodation between the Israelis and the Palestinians have also been focused on the protection of rights. In the 1980s, that effort centered on the possibility of an international conference to find a solution. The United Nations had long viewed the rights of the Palestinians as being in jeopardy, particularly since the 1967 war, when Israel occupied the Gaza Strip and the West Bank of the Jordan River, two sectors of historic Palestine that it had not occupied in 1948. As suggested by the United Nations General Assembly, an international conference would be convened with certain principles understood in advance to protect the rights of the Palestinians. These rights would include the right of return for displaced Palestinians, the right of self-determination of the Palestinian people and their right to establish a state, an Israeli withdrawal from the Gaza Strip and West Bank, including Jerusalem, and a rejection of the permissibility of Israeli settlements in the Gaza Strip and West Bank.¹³ The United Nations had previously deter-

¹¹ See U.N. CHARTER, art. 39.

¹² See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention].

¹³ See G.A. Res. 38/58C, U.N. GAOR, 38th Sess., Supp. No. 47, at 47, U.N. Doc A/38/47 (1983).

mined Israel to be in violation of international law on these issues.¹⁴ Thus, protection of rights was built into the contemplated peace process.

That approach was abandoned, however, in 1991, when the United States and the Soviet Union hosted a conference in Madrid to promote instead a negotiation between the two parties alone, rather than an international conference, and with no explicit prior specification of the rights to be protected.¹⁵ Israel and the PLO were to negotiate a solution that, presumably, would be recognized by the international community.¹⁶ The advantage of this approach was that the interested parties were those best positioned to resolve the myriad issues involved. The disadvantage was that this approach put the international community in the background and thus reduced its ability to ensure that their agreement would remain within the bounds of what is required by international norms. The Madrid approach gave more play to the power relationship between the two parties and brought the risk that Israel, as the stronger of the two parties, might force acceptance of its entire agenda.

What role remained for the international community in the Madrid process was a matter of controversy. The United States has taken what one might call an extreme bilateralist view of the process. Under this view, the PLO and Israel were to be left alone to work out an agreement, and the international community is not to interfere, even if one or another of the parties takes action that might jeopardize the process.

One of the stipulations that the United States made as co-convenor of the Palestinian-Israeli talks was that the U.N. Security Council in particular should take a hands-off approach to the process. In a letter to the Palestinian negotiating team early in the process, the U.S. Department of State wrote:

With regard to the role of the United Nations, the U.N. Secretary General will send a representative to the conference as an observer. The co-sponsors will keep the Secretary General apprised of the progress of the negotiations. Agreements reached between the parties will be registered with the U.N. Secretariat and reported to the Security Council, and the parties will seek the Council's endorsement of such agreements. Since it is in the interest of all parties for this process to succeed, while this

¹⁴ See S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg. at 5, U.N. Doc S/INF/36 (1980).

¹⁵ See R.W. Apple, Jr., *Mideast Foes List Demands and Trade Angry Charges Across Conference Table*, N.Y. TIMES, Nov. 1, 1991, at A1.

¹⁶ See The Peace Conference, 6 PALESTINE Y.B. INT'L L. 262-302 (1990-91) (providing documents related to the Madrid conference).

process is actively ongoing, the United States will not support a competing or parallel process in the United Nations Security Council.¹⁷

The United States, as will be indicated below, construed the last sentence broadly, to the point of opposing Security Council condemnation of acts by Israel widely recognized as unlawful with respect to matters on which the two parties must come to agreement. Although it engaged in discussions with Israel to encourage it to avoid unlawful actions that jeopardize the peace process, it eschewed formal United Nations action aimed at that end.

Most other United Nations member states, to the contrary, have taken a view of the post-Madrid process that is more multilateralist, and thus more in keeping with the approach taken in the 1980s. They have considered that the international community retains a responsibility, and they have been willing to apply pressure against actions deemed injurious to the process.

The difference in perspective first came to a head in 1995 over Israel's confiscation of land for new settlements for Israeli civilians in east Jerusalem. Most U.N. member states considered Israel's actions so detrimental to an eventual Israeli-Palestinian accommodation as to require U.N. pressure on Israel to reverse its course. The Palestinians anticipated exercising sovereignty in the Gaza Strip and West Bank, but if Israel inserted more settlers, that prospect diminished. In the Security Council, a draft resolution was proposed to condemn Israel's plan. Fourteen of the Council's fifteen members voted in favor of the resolution, but it was not adopted as result of a veto cast by the United States.¹⁸

Council members other than the United States viewed stopping Israel's plan as critical to preserving the legal position of the two parties, thus ensuring that an eventual accommodation would accord with generally recognized standards — here the right of self-determination and the prohibition against inserting settlers into occupied territory. During debate on the draft resolution, the delegate of the United Kingdom expressed concern about the impact of Israel's action, saying that Israel should "refrain from taking actions which seek to change the status quo

¹⁷ U.S. Letter of Assurances to the Palestinians, Oct. 18, 1991, in 6 PALESTINE Y.B. INT'L L. 281, 281-82 (1990-91).

¹⁸ See U.N. SCOR, 50th Sess., 3538th mtg. at 6, U.N. Doc. S/PV/3538 (1995); see also Barbara Crossette, *U.S. Vetoes a Condemnation in U.N. of Israeli Land Seizure*, N.Y. TIMES, May 18, 1995, at A10.

on this most sensitive of all issues before the conclusion of the final-status negotiations."¹⁹

In early 1997, the same issue came to the fore again, when Israel announced plans to build 6500 units of housing for Jews in the Jebel Abu Ghneim section of east Jerusalem, which Israel planned to name Har Homa.²⁰ The evident aim was to complete a line of settlements between east Jerusalem and the rest of the West Bank, thus giving Israel greater control over Jerusalem, which it hoped would emerge from a Palestinian-Israeli agreement under its exclusive sovereignty.²¹ In the U.N. Security Council, a European-sponsored resolution was tabled to condemn Israel's plan as illegal, and a "major obstacle to peace." Again, fourteen Council members voted in favor, but again the United States vetoed.²² The United States viewed both the draft resolutions as an interference with the Palestinian-Israeli bilateral process, whereas the other Council members viewed Israel's actions as constituting such an interference.

United Nations activity did not end with the two vetoes, however. Member states were sufficiently concerned about Israel's actions to take the matter to the General Assembly, where no state has veto power. The draft resolution over Jebel Abu Ghneim/Har Homa that the United States vetoed in the Security Council was proposed in the General Assembly as a draft resolution, and the Assembly adopted it. This resolution characterized the planned settlement construction as illegal under the law of belligerent occupation and "[c]all[ed] upon the Israeli authorities to refrain from all actions or measures, including settlement activities, which

¹⁹ U.N. SCOR, 50th Sess., 3538th mtg., *supra* note 18, at 7 (comments by Sir David Hannay, U.K.); *see also id.* at 3-5, 8 (comments of Mr. Lavrov, Russian Federation; Mr. Wisnumurti, Indonesia; Mr. Fulci, Italy; and Mr. M  rim  e, France, all asserting that the 1995 land seizures were intended to preempt the Palestinian claim of sovereignty in east Jerusalem).

²⁰ *See* Serge Schmemmann, *Jewish Housing for East Jerusalem Approved*, N.Y. TIMES, Feb. 27, 1997, at A1.

²¹ *See Netanyahu Insists Har Homa Goes On*, AGENCE FRANCE PRESSE, Dec. 11, 1997, available in 1997 WL 13452534 (stating that the Palestinians and the United States are of the view that the aim of the Har Homa settlement is to give control as a precursor to keeping the area in final status negotiations).

²² *See* Paul Lewis, *U.S. Vetoes U.N. Criticism of Israel's Construction Plan*, N.Y. TIMES, Mar. 8, 1997, at A3; U.N. SCOR, 52d Sess., 3747th mtg. at 4, U.N. Doc. S/PV.3747 (1997).

alter the facts on the ground, preempting the final status negotiations, and having negative implications for the Middle East Peace Process."²³

Despite the General Assembly call, Israel shortly began construction of the planned Har Homa settlement, an action that prompted renewed activity in the Security Council. A draft resolution was proposed there asking that Israel "immediately cease construction of the Jebel Abu Ghneim settlement in East Jerusalem, as well as all other Israeli settlement activities in the occupied territories." Thirteen Council members voted in favor of the draft resolution, but the United States again vetoed.²⁴ Consistent with its prior position, the United States considered the draft resolution an inappropriate interference in the bilateral process. The U.S. delegate, explaining the veto, said that the United Nations was not the "proper forum" for discussion, but rather that "the parties themselves are those that should deal with these very, very important issues."²⁵

In the wake of this U.S. veto in the Security Council, the General Assembly invoked its "Uniting for Peace" procedure to convene a special session to address the issue. This procedure, devised by the General Assembly during the Korean war, calls for a General Assembly recommendation to deal with a threat to the peace when the Security Council has been prevented from acting because of a veto of a permanent member.²⁶ By a new resolution, the Assembly reiterated its criticism of Israel's construction of Har Homa and took the additional step of asking states to refrain from giving aid to Israel that might be used for that construction.²⁷ This latter call was obviously aimed at the United States, the only state that gives aid to Israel, implying that this aid was facilitating Israel's acts that jeopardized the peace process.

²³ G.A. Res. 51/223, U.N. GAOR, 51st Sess., 93rd mtg. at 9, U.N. Doc. A/RES/51/223 (1997); see also Paul Lewis, *Israel's Plan for Jerusalem is Condemned by Assembly*, N.Y. TIMES, Mar. 14, 1997, at A12.

²⁴ See U.N. Press Release SC/6345, Security Council Again Fails to Adopt Resolution on Israeli Settlement, Mar. 21, 1997 (visited Feb. 28, 1999) <<http://www.un.org>> (document search); Paul Lewis, *U.S. Again Vetoes a Move by U.N. Condemning Israel*, N.Y. TIMES, Mar. 22, 1997, at A4 (describing Costa Rica's abstention); U.N. SCOR, 52d Sess., 3756th mtg. at 6, U.N. Doc. S/PV.3756 (1997).

²⁵ Rene Slama, *Washington to Veto Resolution Again on Settlement*, AGENCE FRANCE PRESSE, Mar. 22, 1997, available in LEXIS, News Library, AFP File.

²⁶ See G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

²⁷ See G.A. Res. ES-10/2, U.N. GAOR, 10th Emerg. Spec. Sess., 3d plen. mtg. at 1-3, U.N. Doc. A/RES/ES-10/2 (1997); see also *Israel Warned to Halt New Housing for Jews*, N.Y. TIMES, April 26, 1997, at A4.

When by mid-1997 no action had been taken by Israel to stop construction of the Har Homa settlement, the General Assembly re-opened its special session and by resolution condemned Israel for ignoring its prior resolutions, and called on states signatory to the Geneva Civilians Convention to hold a conference on enforcement of the Convention in the occupied territories. The Geneva Civilians Convention is the principal treaty on belligerent occupation, and it calls for collective enforcement action.²⁸ The resolution also called on Israel to provide information on goods produced in its settlements, and called on states to discourage activities, even by private parties, that directly contribute to Israel's settlement construction in the occupied territories, including Jerusalem.²⁹

Later in 1997, the General Assembly again took up the matter of assembling the parties to the Geneva Civilians Convention, this time calling on Switzerland, as the depository state for that Convention, to hold a meeting of experts from the states party to the Convention to prepare for a meeting of the high contracting parties that presumably would pressure Israel to stop construction of housing for more settlers. The Assembly set a target date of February 28, 1998 for the meeting of experts to be held.³⁰ As of March 1998, the meeting had not been called by Switzerland, so the General Assembly adopted a follow-up resolution reiterating its call for a meeting of experts, and extended the target date to April 30, 1998.³¹

All these General Assembly resolutions were adopted by overwhelming majorities, with only the United States, Israel, and a handful of other states voting in the negative or abstaining. The United States consistently viewed these resolutions as interfering with the bilateral process. The large majority that voted for these resolutions considered, to the contrary, that Israel's actions interfered with the bilateral process, and that these actions needed to be reversed if that process were to have any chance of success. The majority took the view that such actions, precisely because they were unlawful, would lead the eventual accommodation in a negative direction. The majority placed greater emphasis than did the United States on an accommodation in which legal rights would be respected.

²⁸ See Geneva Civilians Convention, *supra* note 12, art. 1.

²⁹ See G.A. Res. ES-10/3, U.N. GAOR, 10th Emerg. Spec. Sess., 5th plen. mtg. at 2, U.N. Doc. A/RES/ES-10/3 (1997); see also Farhan Haq, *U.N.-Middle East Assembly Rebukes Israeli Settlers*, Inter Press Serv., July 15, 1997, available in 1997 WL 7076470.

³⁰ See G.A. Res. ES-10/4, U.N. GAOR, 10th Emerg. Spec. Sess., 7th plen. mtg. at 3, U.N. Doc. A/RES/ES-10/4 (1997) (adopted 139 to 3, with 13 abstentions, negative votes being those of Israel, Micronesia, and the United States).

³¹ See G.A. Res. ES-10/5, U.N. GAOR, 10th Emerg. Spec. Sess., 9th plen. mtg. at 2, U.N. Doc. A/RES/ES-10/5 (1998).

Reacting to the General Assembly's request, Switzerland invited Israel and the PLO to attend a meeting in Geneva in June 1998, with the objective of convening experts from all states party to the Geneva Civilians Convention in the autumn of 1998. Israel and the PLO participated in the June meeting, and the International Committee of the Red Cross, also invited by Switzerland, participated as an observer.³²

This Swiss approach differed from what the General Assembly had requested in that Switzerland was preparing not a meeting of the high contracting parties, but rather a meeting of experts to be designated by the high contracting parties. A meeting of experts would not be in a position to take action that might induce Israel to comply with the Geneva Civilians Convention. Further, the preparatory meeting called by Switzerland was not of experts of all the high contracting parties, but only of Israel, the PLO, and itself, with the International Committee of the Red Cross observing.

In a related 1998 action that reflected a similar difference in perspective between the United States and other U.N. member states, the General Assembly voted overwhelmingly to upgrade the PLO's observer status at the United Nations in a way that moved it closer to being considered a state.³³ In the 1970s, the General Assembly had declared that the Palestinian people were entitled to self-determination³⁴ and on that basis, granted the PLO the status of an observer at the United Nations.³⁵ The 1998 resolution allowed the PLO to act more like a state at the United Nations, although it still left it without the right to vote.

The United States, as one of only four states to vote in the negative on this resolution,³⁶ argued that the resolution would "undermine our ef-

³² See generally, e.g., Jay Bushinsky, *Israelis, Palestinians Back Humanitarian Law Talks*, JERUSALEM POST, June 12, 1998, at 2 (noting that the meeting resulted in frank and constructive talks). In 1999, the General Assembly requested that the Convention's Parties, rather than Switzerland, convene a meeting of the Parties, and set a date of July 15, 1999 for such meeting. See G.A. Res. ES-10/6, U.N. GAOR, Spec. Sess., U.N. Doc. A/RE 5/ES-10/6 (1999).

³³ See *Participation of Palestine in the Work of the United Nations*, G.A. Res. 52/250, U.N. GAOR, 52d Sess., 89th plen. mtg., U.N. Doc. A/RES/52/250 (1998).

³⁴ See G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974).

³⁵ See G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974).

³⁶ See Barbara Crossette, *Palestinians' U.N. Role Widened; A U.S. 'No' Vote is Overwhelmed*, N.Y. TIMES, July 8, 1998, at A8 (indicating that the four states voting in the negative were the United States, Israel, the Marshall Islands, and Micronesia).

forts to get the peace process back on track.”³⁷ The majority, to judge from the text of the resolution, viewed the recognition of the PLO’s status as being helpful to the process. The resolution recited ways in which the PLO was carrying out governance in the Gaza Strip and West Bank and thus was exercising functions normally associated with state sovereignty.

IV. DIFFERENCES IN THE APPROACH TO ISSUES

The tension between a strongly law-based approach and one in which legal standards would play a minor role is apparent with respect to the major outstanding issues between the two parties. The parties’ initial agreement, their 1993 Declaration of Principles, contemplates a phased transfer of authority from Israel to the PLO over a five-year period, leading to negotiations on a “final status” between the parties.³⁸ The Declaration of Principles specified the major issues in dispute that would require resolution in the “final status” negotiations which were to be completed by the end of the interim period.³⁹

The outstanding issues specified in the Declaration are those that have long separated the two parties and have kept them from reaching agreement. They are: 1) the drawing of a border between the territories to be held by each party; 2) the fate of settlements Israel has built in the Palestinian territory it occupies; 3) the status of Palestinians displaced in the hostilities of 1948 and 1967; and 4) an appropriate regime of control for the city of Jerusalem.

This framing of the issues was advantageous to Israel in that it excluded any mention of Israel’s status as a state and thus implied recognition by the PLO that Israel’s status as a state was not being challenged by the PLO – contrary to the position it took on that issue in earlier years. Concurrent with the signing of the 1993 Declaration, the PLO sent a separate communication to Israel recognizing it as a state.⁴⁰

The four issues specified in the 1993 Declaration are issues that remain after the dispensing of that basic issue. They are all highly contentious, involving matters that are quite basic in the world view of each of the parties. Resolution of these issues is not expected to come readily. On

³⁷ *Id.*

³⁸ See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, *Isr.-Palestine Liberation Organization*, art. 5, 32 I.L.M. 1525, 1528 (1993).

³⁹ See *id.* art. 5 (agreement between Israel and Palestine Liberation Organization to negotiate on “permanent status” issues).

⁴⁰ See Letter from Yasser Arafat, Chairman, PLO, to Yitzhak Rabin, Prime Minister of Israel (Sept. 9, 1993) (*reprinted in* 7 *PALESTINE Y.B. INT’L L.* 230 (1992-94)).

each of the four issues, the two parties espouse widely differing positions. Each issue is impacted by international legal norms, and each has been the subject of consideration by the United Nations, which has devoted considerable attention to the Palestinian-Israeli dispute.

When one examines the position of the two parties on each of the four issues, one finds a difference with respect to the conformity of the positions to the applicable international legal standards. Both parties in their analysis of these issues devote attention to the applicable legal standards. Both claim that their positions conform to those standards.

The conformity or non-conformity of the parties' positions to legal standards is highly relevant to the viability of those positions. As suggested above, if positions that find their way into a territorial agreement conform to legal standards, the chances that the agreement will hold in the long term are considerably higher. Each of the four outstanding issues will next be analyzed from this perspective. The position of each party will be examined for its conformity to legal standards. The four issues are: borders, settlements, displaced persons, and Jerusalem.

A. Borders

One key issue, perhaps the most important, to be resolved between the two parties is that of a future border. During the period leading up to negotiations, the PLO has been anxious to have Israel withdraw from as much territory as possible, whereas Israel has been anxious to remain in control of substantial sectors. The 1993 bilateral Declaration of Principles signed by Israel and the PLO requires Israel to engage in a phased withdrawal that would have it out of the territories by the time final status talks begin.

The 1993 Declaration of Principles calls for negotiations to be based on a resolution adopted by the U.N. Security Council in 1967, Resolution 242. Adopted in the wake of the June 1967 war, Resolution 242 referred to the "inadmissibility of the acquisition of territory [i.e., the Gaza Strip and West Bank] by war."⁴¹ The resolution called for the "withdrawal of Israel armed forces from territories occupied in the recent conflict."⁴²

Israel insists on maintaining control of substantial sectors of the Gaza Strip, and particularly the West Bank, for the indefinite future. A document circulated at a 1997 meeting of Israel's cabinet suggested an

⁴¹ See Declaration of Principles on Interim Self-Government Arrangements, *supra* note 38, art. 5, at 1529 (agreement between Israel and P.L.O. to negotiate on "permanent status" issues).

⁴² S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF/22/REV.2 (1967).

intent to claim land sectors in the Jerusalem area, and in the Jordan River valley.⁴³ Prime Minister Benjamin Netanyahu, in a 1998 interview, indicated the degree to which he hopes to remain in control of the Gaza Strip and West Bank when he said, regarding his aims in the negotiations, that Israel should control all international passage points, and that he opposed the formation of a Palestinian entity that could be called a state.⁴⁴

These expressions of intent notwithstanding, by signing the 1993 Declaration of Principles with its reference to Resolution 242, Israel agreed to negotiate on the basis of an understanding that it must withdraw. The Declaration of Principles is an internationally binding instrument. Although Israel disputes this point, the Declaration of Principles is an instrument whose content is of the character customarily found in international treaties, and the PLO had the legal capacity to enter such an agreement.⁴⁵

The PLO, along with most U.N. member states, construes the withdrawal obligation in Resolution 242 as requiring Israel to withdraw from all, or substantially all, of the territory of the Gaza Strip and West Bank. Israel, to the contrary, views it as calling on Israel to withdraw from an unspecified portion of the territory of the Gaza Strip and West Bank, a portion that might be rather small.⁴⁶ The dispute centers on the fact that, in the English language version of Resolution 242, the definite article was, during the drafting process, deleted as a modifier of the "territories" from which Israel was being asked to withdraw. Israel views this deletion as indicating that it was not expected to withdraw from all the territories.

The PLO view is that Resolution 242 calls on Israel to withdraw from substantially the entire territory of the Gaza Strip and West Bank, leaving to the parties the possibility of negotiating border adjustments of a minor character.⁴⁷ The PLO's view is the more widely held view of the meaning of Resolution 242 and more consistent with its text and history. The preamble language referring to the inadmissibility of the acquisition

⁴³ See *Palestinians Blast Report that Israel Wants Most of West Bank*, DEUTSCHE PRESSE-AGENTUR, May 29, 1997, available in LEXIS, News Library, DPA File.

⁴⁴ See Herb Keinson & Saul Singer, *We Are Not "Freiers,"* JERUSALEM POST, Apr. 29, 1998, at 13, available in LEXIS, News Library, Papers File.

⁴⁵ See generally John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L. J. 717 (1997) (noting that Israel disputes the binding character of the Declaration).

⁴⁶ See Letter of Assurances, Oct. 18, 1991, in 6 PALESTINE Y.B. INT'L L. 286, 288 (1990-91) (noting the difference of interpretation of Resolution 242).

⁴⁷ See MUSA MAZZAWI, *PALESTINE AND THE LAW: GUIDELINES FOR THE RESOLUTION OF THE ARAB-ISRAELI CONFLICT 200-24* (1997) (offering a detailed analysis of Resolution 242 as calling for Israel to withdraw from the occupied territories).

of territory by military means strongly implies an obligation to withdraw from such territory. The text in the French version preserves the definite article, and so that text suggests that Israel must withdraw from "the territory" of the Gaza Strip and West Bank.

Statements by delegates at the time of passage suggest that some were reluctant to insist on Israel's withdrawal precisely to the territory it occupied prior to the 1967 war, because the territory it occupied up until that date was territory it held under armistice agreements signed in 1949 with neighboring states, agreements that were not viewed as establishing borders. Thus, there was reluctance to require Israel to withdraw to lines that might, by virtue of such a call for withdrawal, be viewed as bearing a legitimacy that they did not in fact enjoy.⁴⁸

The withdrawal language of Resolution 242 is not, in any event, consistent with a partial Israeli withdrawal that would leave it in control of substantial sectors of the Gaza Strip or West Bank. Resolution 242 must be construed consistently with applicable international legal norms, and these are quite clear on the matter of territory occupied during hostilities. Such territory does not fall under the sovereignty of the occupant, and possession by virtue of occupation gives it no basis for a claim to sovereignty. Belligerent occupation yields only a right of temporary possession, not title to territory. The sovereign right of the legitimate sovereign remains intact, even though it is not able to exercise control.⁴⁹ Thus, even apart from what Resolution 242 may mean, Israel is under an obligation to withdraw from the Gaza Strip and West Bank.

B. Settlements

The issue of borders is closely connected to that of the civilian settlements that have been established by Israel in the Gaza Strip and the West Bank. Israel appears inclined to continue, after a peace agreement, to control territory on which it has located settlements. According to positions taken by the Netanyahu government, Israel anticipates that its settlements will remain under an accommodation with the PLO, and that Israel will continue to control the territory of the settlements. In a 1998 interview, Prime Minister Benjamin Netanyahu, responding to a question about his position on retention of the settlements, said, "our insistence

⁴⁸ See *id.* at 211-12.

⁴⁹ See generally GERHARD VON GLAHN, *LAW AMONG NATIONS* 768 (1992); see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 287 (3rd ed. 1991). Cf. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968) (arguing that Israel's claim to the West Bank is strongest).

has been on keeping all the settlements."⁵⁰ Netanyahu indicated his aim as well to keep the land around the settlements.⁵¹

The PLO entered into the 1993 Declaration of Principles even though it knew that Israel would control the areas of its settlements through the interim period. An approach had been attempted by the Palestinian negotiators in 1991-92 to get Israel to stop applying Israeli law to the settlements and the settlers. It wanted Israel to agree to such a cessation before the two parties arrived at any agreement about an interim period, and about a Palestinian self-governing authority.⁵² The PLO, when it inserted itself into the negotiating process in 1993, did not insist on such an immediate cessation of Israeli authority.

The question remains, nonetheless, whether the settlers will remain or leave after a final PLO-Israel agreement. The PLO takes the view that they have no right to remain, whereas Israel takes the view that they do. The PLO view is more consistent with the applicable legal norm because of the regime of belligerent occupation that applies to these territories.

International law typically protects the right of persons to remain in their areas of habitation, even if sovereignty changes.⁵³ However, with a belligerent occupation the situation differs. The end of a belligerent occupation is not a change in sovereignty, because the onset of a belligerent occupation does not bring about a change in sovereignty. A belligerent occupant acquires no sovereign rights, and, indeed, Israel has not claimed sovereignty on the basis of its occupation of the Gaza Strip and West Bank.

The law of belligerent occupation is found in customary international law, and in the 1907 Hague Regulations,⁵⁴ and the 1949 Geneva Civilians Convention.⁵⁵ The Hague Regulations are widely viewed as having entered the corpus of customary law.⁵⁶ The law of belligerent occupation requires an occupying power to preserve the existing order as

⁵⁰ Keinon & Singer, *supra* note 44, at 13.

⁵¹ *See id.*

⁵² RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 269-71 (1997).

⁵³ *See Report of the International Law Commission on the Work of its Forty-Seventh Session*, U.N. GAOR, 50th Sess., Supp. No. 10, Annex, at 271-75, U.N. Doc. A/50/10 (1995) (stating that every person has a right to nationality).

⁵⁴ *See Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, Annex, art. 43, 1 Bevans 631, 651 (1907) [hereinafter *Hague Regulations*].

⁵⁵ *See Geneva Civilians Convention*, *supra* note 12, at 287.

⁵⁶ *See ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982*, 43 (1985).

much as is possible, in the expectation that it will ultimately withdraw. It must preserve the "civil life" of the territory.⁵⁷

Under the law of belligerent occupation, the establishment of civilian settlements is unlawful. Article 49 of the Geneva Civilians Convention states, "The Occupying Power shall not . . . transfer parts of its own civilian population into the territory it occupies."⁵⁸ The Hague Regulations do not address the transfer of civilians, but prohibit use of land in occupied territory for settlement construction. The Hague Regulations require the occupying power to administer public lands to benefit the local population,⁵⁹ and instruct it not to confiscate private property.⁶⁰ Thus, under the Hague Regulations, use of either public or private land for settlement construction is forbidden.

Israel's settlements have been condemned by other states and by United Nations bodies as being in violation of Article 49 of the Geneva Civilians Convention. The General Assembly, in one of many resolutions on the matter, "strongly condemn[ed] . . . [the] [e]stablishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an alien population thereto."⁶¹ The Security Council resolved that "Israel's policy and practices of settling parts of its population and new immigrants in those territories [the territories occupied in 1967] constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War [Geneva Civilians Convention] and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."⁶²

If, contrary to the law of belligerent occupation, an occupant settles its nationals, those persons gain no right of residency. For example, after World War II, Italians who had settled during the war in territory occupied by Italy gained no right of nationality in the states whose territory Italy occupied. These states agreed to extend their nationality to Italians

⁵⁷ See Hague Regulations, *supra* note 54, art. 43 (note use of the term *vie publique* in the official French text of the regulations).

⁵⁸ Geneva Civilians Convention, *supra* note 12, art. 49.

⁵⁹ See Hague Regulations, *supra* note 54, art. 55.

⁶⁰ See *id.* art. 46.

⁶¹ G.A. Res. 37/88C, U.N. GAOR, 37th Sess., Supp. No. 51, at 93, U.N. Doc. A/37/51 (1982-83).

⁶² S.C. Res. 465, *supra* note 14, at 5.

who settled prior to the war, but not to those who settled during the occupation.⁶³

Israel followed the accepted practice in its only previous withdrawal by agreement from territory it had occupied. In 1979, Israel agreed to withdraw from the Sinai Peninsula, territory of Egypt that it had occupied during the 1967 war. As part of that withdrawal, Israel agreed to evacuate Israelis who had settled during the time of its occupation.⁶⁴ Israel complied with this obligation and evacuated these settlers.⁶⁵

The legally required outcome regarding the settlers is that they have no residency rights that must be respected by the sovereign of the territory. Their presence was, *ab initio*, a violation of the rights of the sovereign, and Israel was under a continuing obligation to ensure their departure.

Those Palestinians who own land that was confiscated for the construction of settlements are particularly in jeopardy if a solution is achieved along Israel's preferred path. This would include both those Palestinians who held undisputed title, and the many others whose land was deemed by Israel to be public land, but which under the Jordanian law in effect in 1967 was land privately owned.⁶⁶ If a PLO-Israeli agreement were to allow Israel to retain the settlements, the question would arise regarding the rights of these landowners. If they were left uncompensated, their rights would be violated. Even if they were, under the agreement, to be compensated, the question would arise as to whether they could, in effect, be forced to sell. Property owners whose property rights are left unsatisfied by a PLO-Israel agreement would have legitimate claims that they might pursue.

C. *Displaced Persons*

While the issue of Israeli settlers is likely to prove problematic, so too is the issue of Palestinians who were displaced at the time Israel was

⁶³ See Treaty of Peace with Italy, Feb. 10, 1947, art. 19, 61 Stat. 1245, 1379, 49 U.N.T.S. 3, 136 (setting as the cutoff date June 10, 1940, the date on which Italy declared war on France and Great Britain).

⁶⁴ See Treaty of Peace between the State of Israel and the Arab Republic of Egypt, Mar. 26, 1979, Isr.-Egypt, Annex I, 1138 U.N.T.S. 59, 133 ("Israel will complete withdrawal of all its armed forces and civilians from the Sinai not later than three years from the date of exchange of instruments of ratification of this Treaty").

⁶⁵ See David K. Shipler, *Israel Completes Pullout, Leaving Sinai to Egypt*, N.Y. TIMES, Apr. 25, 1982, at A1 (reporting on Israel's pullout of troops and settlements from Sinai).

⁶⁶ See RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 28 (1988).

established in 1948. Here again the law-based outcome is that being advocated by the PLO Persons displaced in connection with a military conflict are entitled to return to their places of origin, and this is so regardless of the reason for their departure. The only exception to a right of return is that in which a person voluntarily takes on a new citizenship in a manner that indicates a renunciation of residency rights in the former locale. The right of return is not defeated by a change in sovereignty in the territory from which a person was displaced.⁶⁷

This norm requiring a state to repatriate the displaced is followed in international practice. In dealing with military conflict situations, the United Nations Security Council requires states to repatriate the displaced. In the conflict of the early 1990s in Bosnia, the Security Council resolved that "all displaced persons have the right to return in peace to their former homes."⁶⁸ Regarding Serbs displaced from their home areas in Croatia, the Council demanded that Croatia

[I]n conformity with internationally recognized standards . . . respect fully the rights of the local Serb population including their rights to remain, leave or return in safety . . . [and] create conditions conducive to the return of those persons who have left their homes.⁶⁹

The United Nations has long taken the view that Israel is required to repatriate Palestinians displaced in 1948. In its first comprehensive resolution on the Palestinian-Israeli conflict after Israel established itself as a state, the General Assembly said that

[T]he refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.⁷⁰

Israel rejected any obligation to repatriate, disputing the existence of a norm of international law that would require it to do so. However, such an obligation is firmly embedded in international law. An obligation to repatriate the displaced first appeared in the law as a corollary to the

⁶⁷ See generally John Quigley, *Mass Displacement and the Individual Right of Return*, 68 BRITISH Y. B. INT'L L. 65, 88-111 (1997).

⁶⁸ S. C. Res. 779, U.N. SCOR, 47th Sess., 3118th mtg. at 2, U.N. Doc. S/RES/779 (1992).

⁶⁹ S.C. Res. 1009, U.N. SCOR, 50th Sess., 3563d mtg., U.N. Doc. S/RES/1009 (1995).

⁷⁰ G.A. Res. 194, U.N. GAOR, 3d Sess., pt. 1, at 24, U.N. Doc. A/810 (1948).

right of states to expel those who do not hold its nationality. Since states are not obliged to let aliens remain permanently in their territory, the state of origin is required to take them back. The obligation to admit one's nationals is said to be "an inherent duty of States resulting from the conception of nationality."⁷¹

The obligation to repatriate falls as well on a state, like Israel, that newly establishes itself in the territory from which persons were displaced. The state newly in sovereignty may not defeat the right of return by refusing to deem a person its national.⁷² Thus,

A state may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another state, if such person is a national of the first state or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other state.⁷³

A Council of Europe treaty requires a state newly assuming sovereignty to refrain from making racial or ethnic distinctions according to nationality, and to take account of the habitual residence and place of birth of persons affected.⁷⁴ The provision mandating use of these factors must be applied, according to an official commentary to the European treaty, "in the light of the presumption under international law that the population follows the change of sovereignty over the territory in matters of nationality."⁷⁵ The International Law Commission takes the same position in a draft treaty on nationality rights in a change of sovereignty.⁷⁶

Israel has, in declining to repatriate, argued that it lacks space to accommodate large numbers of Palestinians. That rationale is without a legal foundation and as a factual matter is belied by Israel's continuing willingness to accept substantial numbers of Jews. In the waning years of the Soviet Union, Israel took in half a million new immigrants. Prime

⁷¹ PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 51 (Hypocor Press 1979).

⁷² See RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 87 (1972).

⁷³ Research in International Law of the Harvard Law School, *Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens, and Territorial Waters, The Law of Nationality*, 23 AM. J. INT'L L. 13, 16, art. 20 (Supp. 1929).

⁷⁴ See European Convention on Nationality, Nov. 6, 1997, art. 18, Europ. T.S. No. 166.

⁷⁵ *Id.* at 47.

⁷⁶ See *Report of the International Law Commission on the Work of its Forty-Ninth Session*, U.N. GAOR, 52d Sess., Supp. No. 10, arts. 4, 20, 22, 24, U.N. Doc. A/52/10 (1997).

Minister Netanyahu, asked in 1998 whether "there can be another decade in which a million Jews immigrate to Israel," answered in the affirmative.⁷⁷

Israel's position on repatriation is inconsistent with its international obligation. The PLO's insistence on repatriation is consistent with Israel's international obligation. An Israel-PLO agreement based on non-repatriation would leave a substantial segment of the Palestinian population without satisfaction of their legal rights.

D. Jerusalem

The final outstanding issue between Israel and the PLO is that of the status of Jerusalem. Both Israel and the PLO take the position that they are entitled to sovereignty in Jerusalem. Here again the PLO view is more consistent with international norms. The Palestinian claim to sovereignty is based on centuries-long occupation of Palestine. Jerusalem is a part of that territory.⁷⁸

Israel's claim to sovereignty is stated in 1980 legislation that declares Jerusalem, including both its western and eastern sectors, to be Israel's capital city.⁷⁹ This legislation was construed by an Israeli court to be a claim of sovereignty over both sectors of Jerusalem.⁸⁰

While Israel makes a claim to sovereignty in Jerusalem, the basis for that claim is not clear. Israel's principal claim to sovereignty over any territory in historic Palestine lies in the U.N. General Assembly's 1947 recommendation that two states, one Jewish and one Arab, be established there.⁸¹ When the Jewish Agency for Palestine declared the establishment

⁷⁷ Keinon & Singer, *supra* note 44, at 13.

⁷⁸ See generally HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 64-73 (1973) (discussing claims to Palestine in general); U.N. GAOR, 43d Sess., Annex 3 at 13, U.N. Doc. A/43/827, S/20278 (1988) (discussing Palestine's claim of displacement from its homeland).

⁷⁹ See Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980) (declaring that "Jerusalem, complete and united is the capital of Israel").

⁸⁰ See generally Asher Felix Landau, *Court Upholds Israel's Rights on Temple Mount*, JERUSALEM POST, Nov. 15, 1993, at 7 (summarizing the case of Temple Mount Faithful Assoc. v. Attorney General, in which Justice Elon described the history of the Temple Mount in order to establish its bond with the citizens of Israel).

⁸¹ See G.A. Res. 181, U.N. GAOR, 2d Sess., at 131, U.N. Doc. A/519 (1947).

in 1948 of a state to be called Israel, it cited the 1947 General Assembly resolution as its principal legal base.⁸²

That resolution set boundaries for the two projected states but put Jerusalem out of the territory of either, suggesting instead that Jerusalem be an internationally administered enclave.⁸³ As a result, the resolution provides neither side with a basis for claiming Jerusalem. The international community, consistent with the position of the 1947 resolution, to date considers the question of sovereignty in Jerusalem to be unresolved, despite Israel's factual control of west Jerusalem since 1948, and of east Jerusalem since 1967.

Regarding East Jerusalem, Israel faces an additional obstacle because it took east Jerusalem in hostilities. Under international law, territory taken in hostilities is not subject to appropriation by the occupant, regardless of the circumstances under which it came into possession. The United Nations has consistently taken the view that east Jerusalem is territory under Israel's belligerent occupation and hence is not under its sovereignty. When Israel took steps to incorporate east Jerusalem into itself, the United Nations reacted by denouncing the action as unlawful.⁸⁴

In the absence of any legal base put forward by Israel itself, various scholars have argued, in support of Israel's claim to sovereignty in Jerusalem, that Palestine had no sovereign when Great Britain abandoned in 1948 its League of Nations role as mandatory power in Palestine. According to this argument, Palestine was open to occupation by whoever might take it, and on this basis Israel has sovereignty over whatever territory it controls, including west Jerusalem from 1948, and east Jerusalem from 1967.⁸⁵

⁸² See Declaration of the Establishment of the State of Israel, 1 L.S.I. 3, 4 (1948) (mentioning an historic connection of the Jews to the territory of Palestine, but it is not clear if this is the basis of a legal claim).

⁸³ See G.A. Res. 181, *supra* note 81, at 146.

⁸⁴ See S.C. Res. 252, U.N. SCOR, 23d Sess., 1417th mtg. at 9, U.N. Doc. S/INF/23/Rev.1 (1968) (condemning Israeli measures affecting Jerusalem as tantamount to annexation, which the resolution found unlawful for a belligerent occupant as it found Israel to be); S.C. Res. 478, U.N. SCOR, 35th Sess., 2245th mtg. at 14, U.N. Doc. S/INF/36 (1981); *see also* G. A. Res. 35/169(E), U.N. GAOR, 35th Sess., 95th plen. mtg. at 28, U.N. Doc. A/35/48 (1981) (condemning as unlawful an Israeli law on sovereignty over Jerusalem).

⁸⁵ See D.P. O'CONNELL, 1 INTERNATIONAL LAW 140 (1965); *see also* Stephen M. Schwebel, *What Weight to Conquest?* 64 AM. J. INT'L L. 344, 346 (1970) (stating that Israel was acting defensively in 1948 and 1967, thus giving it better title to seized lands than was obtained by Jordan and Egypt); ELIHU LAUTERPACHT, JERUSALEM AND THE

This theory enjoys little following, however, because under the League of Nations arrangement, sovereignty lay in the community of citizens of Palestine, not in Great Britain. A population under a League mandate was deemed to be a subject of international law with a legal interest in the territory that was separate from that of the mandatory power.⁸⁶ In Palestine under the mandate, the inhabitants carried a Palestinian citizenship.⁸⁷ When Britain withdrew, the community of citizens was entitled to exercise sovereignty. The majority of that community of citizens was represented by a political organization, the Arab Higher Committee, that was recognized by the United Nations, and which asserted a right to establish a government for Palestine. Thus, Britain's departure left no void of sovereignty.

The international community has given little support to Israel's claims over Jerusalem. Regarding the eastern sector, it has considered it to be under belligerent occupation, and therefore not subject to appropriation by Israel.⁸⁸ Regarding the western sector, it has continued to view the proposal for an internationalized status as viable, and nearly all states that maintain diplomatic relations with Israel have declined to locate their embassies in Jerusalem.

V. NEGOTIATING STRATEGY

The gulf between what is legally required and what is politically feasible raises problems for both the negotiating parties and the international community. For the international community, the difficulties are already apparent in the U.N.'s handling of the issue. As indicated, the thrust of U.N. activity, the blocking efforts of the United States notwithstanding, has been to orient the process towards conformity with legal demands. The U.S. policy, on the other hand, seems oriented towards finding agreement between the two parties, with less insistence that the agreement conform with legal demands. The United States, to be sure,

HOLY PLACES 44-45 (Anglo-Israel Assoc. 1968); *see also* Blum, *supra* note 49, at 294 (concluding that Israel can show better title to those territories).

⁸⁶ *See* James Brown Scott, *The Two Institutes of International Law*, 23 AM. J. INT'L L. 87, 91 (1932) (quoting paragraph 6 of a 1931 resolution of the Institute of International Law).

⁸⁷ *See* Convention Between the United States and Great Britain in Respect to Rights in Palestine, Dec. 3, 1924, U.S.-U.K., art. 7, 44 Stat. 2184, 2186 (commonly referred to as "Mandate for Palestine"); The Palestine Citizenship Order, 1925, S.R. & O., No. 777, at 474-75 (July 24, 1925); Norman Bentwich, *Nationality in Mandated Territories Detached from Turkey*, 7 BRIT. Y.B. INT'L L. 97, 102 (1926).

⁸⁸ *See* S.C. Res. 478, *supra* note 84, at 14. *See also* G. A. Res. 35/169(E), *supra* note 84, at 28.

acknowledges the desirability of a fair accommodation but is unwilling to exert on Israel the kind of pressure that other states believe to be required. It continues to support Israel with substantial military and economic aid in the face of activities by Israel that the international community finds incompatible with reaching an accommodation with the Palestinians. It has declined, in particular, to comply with the General Assembly's call to stop financial aid that Israel can use to construct settlements in east Jerusalem.

The consequences of an accommodation that does not conform to legal requirements are hard to judge. As with anything in human affairs, it is possible that such an accommodation might stick, despite the deep resentment and unresolved grievances it would leave on the Palestinian side. Such an outcome is, however, unlikely. Several million Palestinian refugees live in poor conditions in neighboring Middle East states, whose governments have no obligation to allow them to remain, or to grant them the rights of citizens. Largely stateless, this population has been the base in the past for the Palestinian military organizations that brought the Palestinian claims onto the international community's agenda in the 1960s and 1970s.

The PLO's strategy of a provisional accommodation with Israel in the hopes that Palestinian limited self-rule might develop into full-blown statehood was met with skepticism by a variety of Palestinian political groupings.⁸⁹ That skepticism grew with the accession to power in 1996 of the Netanyahu government, which was openly critical of the prior Israeli government as being too accommodating towards the Palestinians. Substantial segments of the Palestinian community are poised to take up political opposition if an accommodation is reached that does not accord with legal requirements. An Israel-PLO accommodation on Israel's terms might bring a challenge to the PLO by other political forces. The Islamic group Hamas is today the best positioned for such a role.

On the Israeli side, to be sure, there are groups that would be disaffected if an accommodation were reached on terms that conform to legal requirements. In particular, a segment of Israel's settlers in the Gaza Strip and West Bank might stage a rear-guard campaign if required to abandon their settlements or to submit to being under full Palestinian sovereignty. When Israel dismantled settlements in the Sinai peninsula under the Camp David agreement with Egypt, some settlers resisted, but the matter was resolved through financial compensation paid by Israel to

⁸⁹ See John West, *Palestinian Opposition Pressures PLO on Peace*, REUTERS WORLD SERVICE, Apr. 25, 1994, available in NEXIS, News Library, CURNWS File.

the settlers.⁹⁰ Some Gaza Strip or West Bank settlers might resist an order from the Israeli government to vacate. However, many settlers appear resigned to the need to vacate and are raising the issue of monetary compensation.⁹¹

There is a key difference between the potential demands of disaffected Palestinians and disaffected Israelis, namely, that the demands of the former would be consistent with legal requirements, whereas the demands of the latter would not. That difference would likely affect the reaction of the international community.

VI. A ROLE FOR THE UNITED NATIONS

The Palestinian-Israeli controversy is, for the United Nations, its longest-running conflict. The conflict was on the world organization's first agenda. The effort by the international community in creating the United Nations to impose observance of human rights and self-determination of peoples as principles that must be observed has for the entire lifetime of the organization stood in contradiction to the situation of illegality represented by the subordination of the rights of the Palestinian population of what had been inter-war Palestine.

Now half a century later, Israel and the PLO are locked in dispute over the Gaza Strip and West Bank, which constitute only about twenty per cent of the territory of the former Palestine, and Israel is not disposed to allow Palestinian sovereignty even in that small area. From the standpoint of seeking a law-based solution, one can with some justification argue that the time for such passed long ago, and therefore that it is pointless to use legal standards as a basis for an Israeli-Palestinian accommodation. No solution with a realistic chance of being implemented can restore Palestine to the Palestinian people from whom it was wrenched, in anything like its former form.

The fact that a true restoration of the *status quo ante* cannot be achieved is not, however, a license for a continuing disregard of rights. An accommodation can be reached in which Palestinians enjoy full sovereignty over the Gaza Strip and West Bank, in which Israeli settlements can be dismantled, in which displaced Palestinians can be repatriated to Israel, and in which an appropriate status for Jerusalem can be achieved.

⁹⁰ See William Claiborne, *Israel, Settlers Fail to Agree on Sinai Payments*, WASH. POST, Jan. 12, 1982, at A1.

⁹¹ See Herb Keinon, *Unsettled Settlers: Many Will Go If the Price Is Right*, JERUSALEM POST, Dec. 10, 1993, at 2B, available in LEXIS, News Library, Papers File; see also Susan Hattis Rolef, *Back to Green Line Israel*, JERUSALEM POST, Jan. 15, 1996, at 6, available in LEXIS, News Library, Papers File (stating that increasing numbers of Jewish settlers would move if compensated).

The majority position at the United Nations is based on these aims, but cannot be pursued effectively because of the power exercised in the situation by the United States. The United Nations, which assumed the power and obligation of preserving the peace when it adopted its Charter in 1945, could find Israel's posture on the key issues to be a threat to international peace and could take action of the kind it has taken elsewhere in the world to force compliance.⁹²

The majority in the United Nations recognizes a responsibility that the world community carries, and in particular the United Nations, to see the Palestinian-Israeli dispute through to an acceptable conclusion. The posture of the United Nations on the Palestinian-Israeli issue has been uncertain. Like Britain before it, the United Nations allowed the problem to deteriorate. Just as Britain permitted a substantial in-migration of Jews in the inter-war period, creating the social basis for the conflict, so did the United Nations make a proposal for partition, in 1947, that was quite inconsistent with what was legally required.⁹³ Then, when Jewish Agency forces took matters into their own hands and overran Palestine in the spring of 1948, forcing out the Palestinian population as they advanced, the international community reacted only with verbal reprimand, but took no effective action to ensure that the national and territorial rights of the Palestinians would be upheld.

The Palestinians became the victims of a Europe that could not control anti-Semitism, and of lingering colonial attitudes to non-Western peoples. The rights of the Palestinians in their own territory were viewed as secondary to solving Europe's problems. The deterioration of the Palestine situation from 1947 onwards must be counted one of the greatest failures of the United Nations as a world organization responsible for maintaining peace.

The importance of achieving a law-based solution is seen if one contemplates the position in which the United Nations would find itself if a non-law-based solution were agreed upon between the parties, if that agreement led to violence threatening the international peace, and if the United Nations at that point tried to intervene. The United Nations can intervene only on the basis of universally held principles. If the PLO and Israel should, hypothetically, arrive at an agreement that provides no right of return to displaced Palestinians, and if a group of Palestinian refugees in Lebanon or Jordan or Syria petitions the United Nations seeking affirmance of their right to return to their home areas within Israel,

⁹² See John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories?* 2 DUKE J. COMP. & INT'L L. 195 (1992) (discussing U.N. action taken against Iraq for its occupation of Kuwait).

⁹³ See G.A. Res. 181, *supra* note 81, at 146.

the United Nations would be hard pressed to tell those groups that their aims are illegitimate. Those groups would be affirming a norm of a right of repatriation for the displaced Palestinians, a position that the United Nations has taken, as indicated above, since 1948. In such circumstances, the United Nations would face a choice between following legal principle, or following the PLO-Israeli agreement.

VII. A ROLE FOR PARTIES TO THE GENEVA CIVILIANS CONVENTION

Another international mechanism, though a less formal one, may play a role as well in the resolution of the Palestinian-Israeli dispute. These are the states that are party to the Geneva Civilians Convention. In adopting this convention in 1949, these states established an ongoing procedure to monitor the rights of peoples who might fall under belligerent occupation. Because the Geneva Civilians Convention is so widely ratified, the states involved are, for the most part, the same states that are members of the United Nations. Nonetheless, the Convention established a separate mechanism, in its Article One. That article requires each state party to "ensure respect" for the convention in all circumstances.⁹⁴ This provision establishes collective responsibility of the states parties towards any population that falls under belligerent occupation.

The U.N. Security Council referred to this collective responsibility some years ago with respect to Israel's occupation of Palestinian lands. Concerned that it had not been able to bring Israel into compliance with its obligations under the law of belligerent occupation, the Council called on the states parties to confer, on the basis of their obligation as Convention parties, to ensure that Israel respect its obligations.⁹⁵ That call bore little fruit at the time, but in 1998, as indicated above, the venture was taken up again by the General Assembly, with its call on Switzerland to convene a meeting of the states parties.⁹⁶

The PLO-Israel negotiations will concern, in large measure, the territory comprised by the Gaza Strip and the West Bank of the Jordan River. Both these pieces of territory fall under the umbrella of the Geneva Civilians Convention since they are under Israel's belligerent occupation. The status of the territories as being under belligerent occupation affects the manner in which their future is to be determined. The Geneva

⁹⁴ See Geneva Civilians Convention, *supra* note 12, art. 1.

⁹⁵ See S.C. Res. 681, U.N. SCOR, 45th Sess., 2970th mtg. at 2, U.N. Doc. S/RES/681 (1990) ("call[ing] upon the High Contracting Parties to the said Convention to ensure respect by Israel, the occupying power, for its obligations under the Convention in accordance with article 1 thereof").

⁹⁶ See G.A. Res. ES-10/4, *supra* note 30, at 3.

Civilians Convention limits the scope of agreements that an occupying power may make with authorities who represent the occupied population. Article 47 of the Geneva Civilians Convention provides:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.⁹⁷

Any annexation, even a partial one, of the Gaza Strip or West Bank would seem to be precluded by Article 47. It is, indeed, one of the basic principles of the international law relating to military force that territory may not be acquired through hostilities, regardless of whether the force used to occupy the territory was offensive or defensive in character. Further, as indicated above, the Geneva Civilians Convention prohibits the settling by the occupying power of civilians in occupied territory.

Like the United Nations, however, the circle of states parties to the Geneva Civilians Convention finds itself in the awkward position of having tolerated Israeli violations for so long that reversal becomes politically difficult. Nonetheless, the new situation created by the prospect of Israeli-Palestinian final status negotiations, plus the call by the U.N. General Assembly for action by the states parties, may yield results.

VIII. A ROLE FOR EUROPE

The tension between a law-based solution and a politically feasible solution is heightened by the role of the United States, as the major outside force in the situation. As indicated above, the United States, unlike nearly all other member states of the United Nations, has declined to pressure Israel into achieving law-based solutions to its differences with the Palestinians.

To a certain degree, Europe has begun, collectively, to play a role independent of that of the United States and thus, in some measure, to offset its influence. In the mid-1990s, the European Union, through its collective foreign relations mechanism, assumed an active role on the issue, and its posture differed considerably from that of the United States. The European Union directed pressure at Israel to conform to the law of belligerent occupation, and the basis for the strength of its rec-

⁹⁷ Geneva Civilians Convention, *supra* note 12, art. 47.

ommendations was the considerable trade that Israel maintains with the states of Europe. The European Union is Israel's largest export market.

In 1998 the European Commission adopted a decision urging the fifteen European Union member states to cease all imports of products originating in Israeli settlements in the occupied Palestinian territories.⁹⁸ The basis for the decision was a 1995 trade agreement between the European Union and Israel that allows preferential tariff treatment for Israeli products entering the states of the European Union but restricts this privilege to products originating in Israel.⁹⁹

The European Commission construed the agreement to exclude goods from the occupied territories, on the rationale that they are not the territory of Israel.¹⁰⁰ To reach this conclusion, the European Commission referred to international public law and to U.N. resolutions on the occupied Palestinian territories.¹⁰¹

Israel reacted to the European Commission decision by denouncing the Commission for attempting to determine Israel's borders before the conclusion of agreements between Israel and its neighbors.¹⁰² It said that the decision constituted an "attempt to prejudge Israel's borders, before this problem is duly settled in Israel's talks with its neighbours."¹⁰³ That response posed squarely the difference between a law-based approach and a politically derived approach to Palestinian-Israeli negotiations. Israel was insisting on the primacy of whatever might be negotiated bilaterally, whereas the European Union was insisting on an approach based on legal norms.

Israeli Prime Minister Benjamin Netanyahu said that if the European Union insisted on boycotting imports from Israeli settlements, "that will put an end to any attempt of the European Union to have any kind of fa-

⁹⁸ See *EU/Israel: Plan for Embargo on Exports from Jewish Settlements*, EUR. REP., May 16, 1998, at 10 [hereinafter *Embargo*]; see also Mark Dennis, *Breaking Through: Has the EU Found How to Make Netanyahu Listen?*, NEWSWEEK (Atlantic Edition) June 15, 1998, at 18, available in LEXIS, News Library, MAGS File.

⁹⁹ See, e.g., Interim Agreement on Trade and Trade-Related Matters Between the European Community and the European Coal and Steel Community, of the one part and the State of Israel, of the other part, 1996 O.J. (C 206) 2.

¹⁰⁰ See *Embargo*, *supra* note 98, at 10.

¹⁰¹ See *id.*

¹⁰² See *Israel Angered by EU Call to Boycott Settlers' Produce*, VOICE ISR., May 14, 1998, available in LEXIS, News Library, Non-U.S. News File.

¹⁰³ *Embargo*, *supra* note 98, at 10-11.

ilitating role in the peace process."¹⁰⁴ The European Commission, to the contrary, found no inconsistency between insisting on a law-based approach and playing a facilitating role to bring agreement between the two parties.

IX. CONCLUSION

The foregoing has reviewed, albeit briefly, the legal aspects of the major issues outstanding between Israel and the PLO.¹⁰⁵ It has also reviewed the posture of the international community on this question. With respect to all the outstanding issues, the PLO takes a position that is consistent with international legal norms, whereas Israel takes a position inconsistent with those norms. The international community's agreement with the PLO on these issues is reflected in U.N. resolutions and in the activity of U.N. organs. The view that Israel takes on these legal standards is, in each instance, rejected by the international community, and is inconsistent with those standards.

An Israel-P.L.O. agreement that fails to vindicate the legally protected interests of Palestinians would leave claims of individuals to be resolved by whatever international mechanisms that may be in a position to consider them. Rather than resolving the outstanding issues, such an agreement would let these issues fester, causing difficulties for decades to come.

Agreements resolving territorial disputes, like the dispute over historic Palestine between the Israelis and the Palestinians, must be based on relevant norms that guarantee rights to individuals and communities. Such conflicts are not isolated phenomena. Their solution must be based on compliance with universally recognized norms, both to ensure the rights of the parties, and to ensure that international mechanisms can play their designated roles.

The international community is endeavoring to facilitate an agreement that will be consistent with legal norms. Such an agreement will have a greater chance of remaining stable than one not so based. Such an agreement will put the international community in a position of being

¹⁰⁴ *Netanyahu Says EU Boycott Would Bar It from Peace Process*, BALTIMORE SUN, May 20, 1998, at 19A.

¹⁰⁵ See John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998); see also John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 3 PACE INT' L. REV. 1, 29 (1998) (reviewing the difficult issues of rights to land between Israelis and Palestinians); John Quigley, *Sovereignty in Jerusalem*, 45 CATH. UNIV. L. REV. 765, 765-80 (1996) (discussing the issues surrounding Israel's claim to Jerusalem which need to be resolved between Palestine and Israel).

able to deal with future threats to the peace and at the same time to support the propositions upon which the parties have reached resolution.

